

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

FILED

DEC 09 2010

*Jim Ruby, Executive Secretary
Environmental Quality Council*

**IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF) Docket No. 10-4803
McMURRY READY MIX CO.)
TFN 5 3/143**

**McMURRY READY MIX COMPANY'S RESPONSE TO
OBJECTORS' MOTION TO MODIFY HEARING SCHEDULE**

The Boulder Resident Objectors (BR Objectors) have filed a motion requesting the Environmental Quality Council ("EQC" or "Council") to change its "Order of Presentation" as set forth in the Order of Schedule. The BR Objectors have requested that the EQC "comply" with the Rules promulgated by the Office of Administrative Hearings which, according to them, would require McMurry Ready Mix Company (McMurry) to be the first party to present evidence. The BR Objectors, however, have misconstrued not only the import of the requirements of Wyo.Stat. § 35-11-406, but each of the respective parties' burden of proof. They have also ignored the Councils' General Rules of Practice and Procedure.

By letter dated September 22, 2010, the Department of Environmental Quality (DEQ) Land Quality Division (LQD) notified McMurry that its Permit Application was "technically complete" and that "second public notice is authorized." As relevant here, and pursuant to Wyo.Stat. 35-11-406(e), (g), and (h), the LQD's September 22nd letter is significant for one

simple reason – it represents the agency’s determination in the first instance that McMurry had fully complied with each of the land quality mandates of the Environmental Quality Act. Stated another way, McMurry’s Permit Application could be considered “complete” only if it met each of the requirements set forth in the controlling statute – Wyo.Stat. 35-11-406(a), (b), (c), and (d), as well as all subparts. By so finding, the LQD has confirmed that McMurry had “demonstrate[d] that the application complies with the requirements of this act and all applicable federal and state laws.” Wyo.Stat. 35-11-406(m). If McMurry had not so “demonstrate[d],” the LQD would have been required to reach the opposite conclusion pursuant to subsection (e), declare the Application to be “incomplete,” and to “advise and state in writing to the applicant the information required.” Having concluded that such Application was “complete” under the Act, the LQD had also found that none of the “reasons” described in subsection (m) are at issue.

In summary, the LQD has already concluded that McMurry has met its initial burden of proof as required by Wyo.Stat. 35-11-406. Had there been no objections filed pursuant to subsection (k), the Director of the DEQ would have proceeded to “render a decision on the application within thirty (30) days after completion of the notice period. . . .” Wyo.Stat. 35-11-406(p). In other words, the decision would have been rendered solely on the basis of McMurry’s Permit Application as filed.

The BR Objectors did in fact file written objections. The existence of such objections, however, does not render moot the LQD’s finding that McMurry’s Permit Application is complete, nullify the Agency’s conclusions regarding the appropriateness of granting the

requested permit, nor somehow modify or add to McMurry's burden of proof. Such objections simply invoked the EQC's jurisdiction, and set this matter up for public hearing.

Importantly, it is the BR Objectors who have objected to McMurry's Permit Application, challenged the DEQ's action, and requested the current public hearing. Pursuant to Chapter 1 of the EQC Rules of Practice and Procedure (EQC Rules), such Objectors were required to file a "written petition" with the Council and the Director of the DEQ. The EQC Rules identify several other procedural rules governing the current proceeding, none of which were complied with by the Objectors here. While it may be necessary to address this lack of compliance with the Council during the hearing, these Rules take on a different level of significance in relation to the Motion at hand. In short, these Rules make clear that it is the "Protestant[s]" – referred to by the parties here as "Objectors" – who have the burden of proving that McMurry's Permit Application, and the DEQ's findings and conclusions regarding the same, are in violation of or do not comport with Wyo.Stat. 35-11-406.

Returning then to the current Motion – the BR Objectors bear the burden of establishing as a matter of fact and of law that McMurry's Permit Application must be denied for one or more of the reasons set forth in Wyo.Stat. 35-11-406(m). McMurry is entitled to a directed verdict in the event that they fail to carry that burden, at which time the permit "shall not" be denied, and gravel operations can proceed.

The Council, in the interests of administrative economy, in order to expedite the process, and to conduct the hearing in an orderly fashion, has actually relieved the Objectors

of “going first” as is contemplated by the DEQ Rules. The Council has instead requested the DEQ to be the first party to proceed with its case, thereby allowing its witnesses to describe McMurry’s Permit Application and their findings regarding its compliance with State (and, as appropriate, federal) law. The Objectors must be next on the agenda, however, for the most basic and fundamental of reasons – they are the ones who are arguing that it does not so comply. They have in fact demanded a public hearing before the EQC, the purpose of which is for them to make their case in that regard. They are not entitled to make such a demand, and then attempt to sidestep their burden of proof by not only requesting a special dispensation from application of the EQC Rules to their objections, but by then petitioning the Council to force McMurry to meet some additional burden beyond what is required by Wyo.Stat. 35-11-406 – a burden that it has already met.

In conclusion, the burden of proof in this case currently resides with the Objectors. They are required to establish as a matter of law and fact that McMurry’s Permit Application must be denied for one of the “reasons” set forth in Wyo.Stat. 35-11-406(m).

McMurry respectfully requests that the BR Objectors’ Motion to Modify Hearing Schedule be denied.

Dated this 8th day of December, 2010

McMURRY READY MIX

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8TH day of December, 2010, a true and correct copy of the foregoing **McMURRY READY MIX COMPANY'S RESPONSE TO OBJECTORS' MOTION TO MODIFY HEARING SCHEDULE**, was served upon the following:

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